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In the Supreme Court of the United States

No. 73-518

JAMES ARTHUR WILLIS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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THE UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this cause on June 29, 1973 and the judgment overruling the petition for rehearing or rehearing In Banc entered August 20, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit, not yet reported, was entered on June 29, 1973. The opinion of the Court is shown in the Appendix at page A1.

JURISDICTION

The judgment of the Court of Appeals was entered June 29, 1973 and the order of the Court overruling the petition for rehearing or rehearing In Banc was entered August 20, 1973. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101.

QUESTIONS PRESENTED

1. Whether the cross-examination of petitioner during trial about certain tax returns, about which the Court of Appeals "had serious doubts" as to its propriety (a) violated petitioner's right to confrontation under the Sixth Amendment to the U. S. Constitution, and (b) was in fact prejudicial to this defendant (1) because it exceeded the scope of direct examination, (2) because it involved matters which were irrelevant, incompetent, immaterial and collateral to the issues involved in the case, (3) constituted proof of misconduct or another crime, all of which, taken together with certain other actions by the Assistant Attorney General during the trial of this cause, denied defendant a fair trial under the Due Process clause of the Fifth Amendment to the U. S. Constitution.

2. Whether it was error for the trial court to permit the Assistant Attorney General trying the case to ask incriminating questions of a witness, then requiring the witness to invoke her Fifth Amendment Privilege against self-incrimination, then in turn asking the court to confer immunity upon the witness, all within the presence and hearing of the jury.

3. Whether the trial court erred in not dismissing the indictment in this cause because both the Federal and State

Statutes under which the prosecution was brought were void because they violate the Equal Protection and Due Process clauses of the United States Constitution in that they involve insidious discrimination based upon sex and create a classification patently arbitrary and utterly lacking in justification.

4. Whether the trial court erred in failing to dismiss the indictment because the petitioner was denied due process of law because of the failure of the Government to commence prosecution within a reasonable time after the Government had knowledge of the crimes with which defendant was charged, resulting in actual prejudice to defendant and denying him a fair trial; alternatively, whether the trial court erred by not giving petitioner's requested instruction to the effect that the jury must acquit petitioner if it found that the delay by the Government in bringing the indictment resulted in actual prejudice to defendant.

5. Whether it was error for the trial court to admit the arrest record of an alleged associate of petitioner's.

STATUTES INVOLVED

Title 18, United States Code, Section 1952, prohibiting (1) travel in interstate commerce or the use of any facility in interstate commerce, (2) promote, manage, establish, etc. an unlawful activity, "unlawful activity" being defined as business enterprise involving as applicable to the facts of this case prostitution offenses in violation of the laws of the states in which they are committed or of the United States.

Title 18, United States Code, Section 2421, which prohibits the transportation in interstate commerce of any

woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose.

Missouri Revised Statutes, Section 563.010, which prohibits any person from inducing, persuading, etc. a female person to become a prostitute or who shall entice, persuade or procure, etc. any female person to come into the state or to leave the state for the purpose of prostitution.

Missouri Revised Statutes, Section 563.040, prohibits anyone from accepting, receiving, etc. any money or other valuable thing from the proceeds of the earnings of any woman engaged in prostitution.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari presented by Petitioner who was charged and convicted in the Western District of Missouri of (a) violation of 18 U.S.C. 2421, commonly known as the "Mann" Act and (b) violation of 18 U.S.C. 1952, Travel in Interstate Commerce in aid of an unlawful activity, said activity said to be in this case violation of Federal and State Statutes relating to prostitution.

The evidence against Petitioner may be summarized as follows: a Rose Marie Williams testified she was a prostitute, met Petitioner in a bar in Houston, Texas in January, 1968, went to Leesville, Louisiana shortly thereafter to engage in prostitution, subsequently accompanied Petitioner to Kansas City, Missouri where she engaged in prostitution for him in both Kansas and Missouri until approximately April, 1968. She also stated she had made one additional trip to Leesville, Louisiana during February or March, 1968 to engage in prostitution for Petitioner. Williams testified others had also engaged in prostitution

for defendant. Other Government testimony was essentially corroboration of the testimony of Williams, and it consisted of documents and testimony of other persons tending to support Williams's version of the facts.

One of the documents introduced by the Government over objection was an arrest record for prostitution of a Hattie May Diamond. Diamond had been mentioned by Williams as a prostitute who had worked for Petitioner.

The Government also called as a witness a Raydene Murray, also mentioned by Williams as a prostitute working for Petitioner. Murray was obviously a reluctant witness and, after initial questioning, the trial court had occasion in open court to advise the witness of her right not to answer and her right to have an attorney. After a conference in chambers, the Government advised the court it had an immunity order for Murray. Over objection, and in the presence and hearing of the jury, the Government was permitted to ask the witness incriminating questions, requiring the witness to assert her privilege not to answer. Immunity was then conferred upon the witness.

Petitioner testified on his behalf; on cross-examination, the Government counsel was permitted to ask Petitioner concerning certain purported federal income tax returns prepared for Murray and Williams. As it turned out the returns were allegedly prepared for the year 1969 as opposed to the year in question, 1968, the returns were never filed, were never signed; the returns were never admitted into evidence.

Prior to trial, petitioner moved to dismiss the Indictment stating:

(a) that there had been unreasonable delay by the Government in bringing the prosecution against him and resulting in his actual prejudice;

(b) that the Indictment charged violation of statutes which were themselves unconstitutional as violative of the Fifth and Fourteenth Amendments to the U. S. Constitution. The court overruled these contentions.

Petitioner was convicted on both counts and appealed. The convictions were affirmed by the Eighth Circuit on June 29, 1973. Petitioner's Petition for Rehearing or for Hearing before the Court In Banc was overruled on August 20, 1973.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other courts of appeals and of applicable decisions of this court as to the cross-examination of Petitioner concerning certain tax returns. It is submitted that this cross-examination (a) violated Petitioner's right to confrontation under the Sixth Amendment to the U. S. Constitution and (b) was in fact prejudicial to this Petitioner (1) because it exceeded the scope of direct examination; (2) because it involved matters irrelevant, incompetent, immaterial and collateral to the issues involved in the case; (3) because it constituted proof of misconduct or another crime, all of which, taken together with certain other actions of Government counsel, denied defendant a fair trial under the Due Process clause of the Fifth Amendment to the U. S. Constitution.

On direct examination, defendant testified only to the following: that in March of 1968, he employed Rose Marie Williams as a waitress in the Casa Blanca Club (Tr. p. 411), and that he employed her steadily after March, 1968 (Tr. p. 413).

Defendant was cross-examined by counsel for the Government. During cross-examination, Government counsel, over objection, was permitted to cross-examine defendant about certain alleged tax returns (Tr. pp. 426-427). Certain of the matters asked about were hearsay as to defendant—what an accountant, Tom Little, and what an Ernestine Parker, had said and done. Defendant didn't recall having paid either Rose Marie Williams or Raydene Murray $8,000 for the year 1968 (Tr. p. 425), and didn't recall telling an accountant to prepare such returns for 1968 (Tr. p. 426). The Government's attorney continued

to ask about the tax returns for 1968 (Tr. pp. 427-428) and defendant said he didn't remember as to Rose Marie Williams, but upon further cross-examination, defendant did remember certain matters about Raydene Murray's employment in 1968 (Tr. pp. 439-440). Further objection was made, and it developed that the tax returns were never filed and never signed by anyone (Tr. pp. 441-443). Later it developed that the tax returns related not to the year 1968 at all, but for the year 1969. The Government's attorney told the Court: "I was genuinely under the impression they were in 1968." (Tr. p. 479). Defendant is a member of the Black Race. In connection with another evidentiary matter, the court commented that the Government counsel was prejudiced against members of the Black Race (Tr. p. 305).

Quite clearly, the cross-examination exceeded the scope of direct examination. Defendant never testified on direct examination at all concerning Raydene Murray's employment in the Casa Blanca Club in 1969. He did testify that Murray "was working there" in 1968 (Tr. pp. 412-413). Defendant testified, as to Rose Marie Williams, that, in 1968, she worked part time prior to an accident in April, 1968, and "steady" after that (Tr. p. 413). The Government clearly was attempting to prejudice the defendant by showing complicity in the preparation of fraudulent tax returns—which of course was never proven.

The rule of law applicable, of course, is that cross-examination may not exceed the scope of direct examination. *Philadelphia & Trenton R. Co.* v. *Stimpson*, 39 U.S. (14 Pet.) 448, 461 (1840); *Tucker* v. *U. S.*, 5 F.2d 818 (8th Cir., 1925). The rule limiting the scope of cross-examination of an accused in a criminal case is of constitutional proportions as protecting defendant's right not to incriminate himself. *Tucker* v. *U. S.*, cited *supra; Fitzpatrick* v.

U. S., 178 U.S. 304 (1900); *Brown* v. *U. S.*, 356 U.S. 148 (1958); *U. S. ex rel. Irwin* v. *Pate*, 357 F.2d 922 (1966); *U. S.* v. *Hiken*, 458 F.2d 241 (8th Cir., 1972).

In *Enriquez* v. *U. S.*, 293 F.2d 788 (9th Cir., 1961), the court held that cross-examination is limited to factual areas covered in direct examination and that it was error to ask defendant about acquaintances of defendant other than those mentioned on direct examination. At p. 794.

In *Dixon* v. *U. S.*, 303 F.2d 226 (D.C. Cir., 1962), the prosecution was permitted to cross-examine the witness about matters not developed during direct examination. The court held this was error, stating:

> "The cross examination of the wife outlined above was not within the scope of her direct testimony. She had said nothing about these matters and the statements attributed to her did not directly challenge the truth of anything she had said in her direct testimony. Nor did these statements relate to her bias or prejudice. We find no basis for their use as a foundation for contradicting her, or any other basis for holding the cross examination proper. Moreover, a portion of the contradictions by the officers was with respect to hearsay testimony.
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> * * *
>
> There was ample evidence to carry the case to the jury without this inadmissible testimony; but the latter was so plainly inadmissible and prejudicial that we reverse and remand for a new trial."

Further, such cross-examination was directed to establishing in the jurors' minds an act of misconduct or another crime on the part of the defendant. The courts have held that evidence of acts of misconduct or of arrests

which do not result in a conviction are inadmissible to impeach a witness. *Homan* v. *U. S.*, 279 F.2d 767, 771, *cert. den.* 364 U.S. 66. In *U. S.* v. *Crawford*, 438 F.2d 441 (8th Cir., 1971), the court said: "We follow a long list of precedents in which we have held that it is improper to ask a defendant, who has not placed his general character in issue, whether he has previously . . . committed acts of misconduct. . . ." In *Crawford*, the court reversed a conviction where the prosecutor asked questions concerning the defendant's acquaintances who had been convicted on drug charges. In *Enriquez*, cited *supra*, the Court held it was error for the prosecutor to ask of the defendant whether or not he had committed a crime, i.e., stolen clothing of someone on a prior date, where no offer of a conviction of a felony was made or suggested. The court held that this conduct alone was sufficient to prejudice a jury. At p. 794. In *Erhart* v. *U. S.*, 188 F.2d 336 (8th Cir., 1951), a Mann Act case, where defendant was cross-examined on prior arrests, the court said: "It is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence a jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged." Citations omitted. In *Salerno* v. *U. S.*, 61 F.2d 419, 424 (8th Cir., 1932), the court said: ". . . when, in the prosecution of a defendant, counsel for the Government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the Government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have."

The case of *South* v. *U. S.*, 368 F.2d 202 (5th Cir., 1966), is squarely in point with the facts of the instant case. In

South, the defendant was charged with violation of 18 U.S.C. 1952. The facts as adduced by the Government were that defendant was a professional gambler. The Government also had admitted, over objection, defendant's income tax returns for the years in question, showing a low income figure. The defendant contended that the tax returns were unrelated to the charge of whether he was a professional gambler and that such facts tended to establish that defendant was guilty of tax evasion. The court agreed, stating that such evidence was inadmissible since it had no bearing on the offense with which the defendant was charged. The court further concluded:

> "The Government's purpose in introducing the returns to show that South had non-reported income strengthens the inference of tax evasion. An intimation of such an offense could only have inflamed the jury and prejudiced the defendant in their eyes. . . . We conclude that the returns failed to prove or tend to prove any essential element of the charges embraced in the indictment. Moreover, we are completely convinced that they tended to prove that South was guilty of another crime involving his failure to report his true income in violation of a totally unrelated statute. Such evidence was highly prejudicial, and requires us to reverse the conviction." At pp. 205, 206 (FN omitted).

Moreover, this line of questioning was irrelevant, incompetent, immaterial, and collateral to the issues in the case. The alleged tax returns were never signed by anyone nor filed by anyone. The prosecutor further kept cross-examining about the year 1968—but the returns showed they were prepared for 1969. Certainly, they did not qualify as a prior inconsistent statement of defendant's direct testimony, particularly when defendant stated he

had no knowledge of them and did not direct anyone to file them. In *U. S.* v. *Perlstein*, 120 F.2d 276 (C.A. N.J., 1941), the court said:

> "Throughout the course of the trial government counsel, over objection, took every available opportunity to introduce the name of Enoch L. Johnson into the proceedings. This reached a climax in a series of questions asked defendant Paul upon cross-examination. These questions were not based upon any matter in the record and were obviously intended to leave with the jury the impression that the defendant was linked to the County political leader in some vast criminal scheme. In *Berger* v. *U. S.*, 295 U.S. 278 . . . the Supreme Court awarded a new trial based upon its conclusion that the prosecuting attorney in that case 'overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.' "

Further, the alleged "statement" (whether it was by an accountant, or Williams or Murray) was of course inadmissible for any purpose. In *McKenna* v. *U. S.*, 232 F.2d 431 (8th Cir., 1956), the court held it was improper to cross-examine on exhibits not received in evidence and not for the purpose of laying a foundation for receipt of the exhibits in evidence. In the leading case of *Robbins* v. *Small*, 371 F.2d 793 (1st Cir., 1967), the prosecutor posed a number of leading questions to a witness's signed statement which was not in evidence. The court held that this was error as depriving the defendant of the fundamental right of confrontation of the witness against him. "The prosecutor not being a witness, the inference that the statement he was holding in his hand was Palmer's could not be tested by cross-examination, Palmer could not be cross-examined upon a statement imputed to but not admitted

by him." See *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Pointer* v. *Texas*, 380 U.S. 400 (1965). When an accused's right to cross-examine is violated, the conviction must be reversed. *Burton* v. *U. S.*, 391 U.S. 123 (1960).

Finally, as a matter of Due Process, this court in *Berger* v. *U. S.*, 295 U.S. 278 (1935) awarded a new trial where the cross-examination of an accused overstepped the bounds of propriety and fairness, thus denying the accused a fair trial.

2. The Decision below conflicts with another decision of the appeals court as to whether it was proper to permit Government counsel to ask incriminating questions of its own witness in the hearing and presence of the jury for the purpose of having the witness invoke her privilege against self-incrimination so that immunity could be conferred upon the witness. In any event, this court should grant review of this case because the issue is an important question of federal law which has not been, but should be, settled by this court.

After witness Raydene Murray testified for a short time, counsel had a conference at the Bench. At the end of this conference, the court informed the witness of her Fifth Amendment privilege not to testify as to incriminating matters, and further indicated an attorney would be appointed for her (Tr. pp. 293-294). After conference in chambers, the Government indicated it was going to recall witness Murray, ask her incriminating questions, requiring her to invoke the Fifth Amendment privilege, then would get an order of the Court granting the witness immunity and compelling her to testify (Tr. pp. 331-332). The defendant objected to this procedure being held in front of the jury (Tr. p. 332) but was overruled by the court (Tr. pp. 332-333). Thereupon, in the presence of the jury, coun-

sel for the Government asked the witness incriminating questions, the witness refused to answer on the ground it might incriminate her, the Government obtained an immunity order from the court, and thereupon direct examination proceeded (Tr. pp. 333-335). Subsequently, the Government moved to have the witness declared adverse, the court granted the motion to the extent of permitting leading questions (Tr. p. 357).

This procedure clearly prejudiced the defendant in the jury's eyes. In *United States* v. *King*, 461 F.2d 53 (8th Cir., 1972), a conviction was reversed where the prosecutor called two witnesses to the stand and had them invoke the privilege repeatedly. The court held:

> "No useful government purpose was served by calling these witnesses other than in forcing them to take the privilege in a manner obviously prejudicial to the defendant. As Professor Wigmore has said: 'The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.' 8 Wigmore on Evidence, Sec. 2272, p. 426 (McNaughton rev. 1961). In the instant case when the witnesses refused to answer whether they were with King on the night of the bombing, the obvious direct effect was, 'Yes, I was and if I would tell you about it it would incriminate me.' This is as strong as pointing a finger at King and saying he did it. Yet the defendant King is helpless to cross-examine. Each case must be judged on its own facts but there can be little doubt of the prejudicial atmosphere created here. Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963); United States ex rel. Fournier v. Pinto, 408 F.2d 539 (3 Cir., 1969); San Fratello v. United States, 340 F.2d 560 (5 Cir., 1965); Fletcher v. United States, 118 U.S. App. D.C. 137, 332

F.2d 724 (1964); United States v. Maloney, 262 F.2d 535 (2 Cir., 1959); cf. Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); United States v. Forte, No. 71-1721 (8 Cir., May 17, 1972).

Judgment reversed and remanded for a new trial." (FN Omitted.)

See *U. S.* v. *Williams,* (8th Cir., 1972) No. 71-1724 wherein the court reversed a conviction where the prosecutor asked a defense witness as to the invocation of the Fifth Amendment privilege before a Grand Jury.

In *Robbins* v. *Small,* cited *supra,* the Court reversed a conviction, *inter alia,* where a prosecutor continued with leading questions after a witness was apparently claiming the privilege. At p. 795. Here, although immunity had been granted, the prosecutor being permitted to ask leading questions to the witness after not getting the answers he desired, again conveyed the clear message to the jury the witness was lying, no doubt to prejudice defendant. It prejudiced the defendant, denying him a fair trial.

3. The Decision of the trial court and the court of appeals below was in conflict with the general trend of this court's decisions and the decisions of other courts of appeals with respect to the question of whether the federal and state statutes under which the prosecution of petitioner was brought was void because they violate the Equal Protection and Due Process clauses of the United States Constitution.

Count One of the Indictment charged defendant with a violation of Title 18, Section 2421, U.S. Code, which provides a criminal penalty for anyone who transports a *woman* in interstate commerce for immoral purposes. Count II of the Indictment charged defendant with a violation of Title 18, Section 1952, which provides, *inter alia,*

for a criminal penalty for a person who operates an unlawful activity. An unlawful activity in this case was defined as a violation of Title 18, Section 2421, U.S. Code, and also of Sections 563.010 and 563.040, Missouri Revised Statutes. Section 563.010 provides, *inter alia*, "that any person . . . who shall induce, persuade, encourage, inveigle or entice a *female* person to become a prostitute . . . or who shall inveigle, entice, persuade, encourage, or procure any *female* person to come into this state or to leave for the purpose of prostitution . . . or who shall receive or give, or agree to receive or give any money or thing of value for procuring or attempting to procure any *female* person to become a prostitute or to come into this state or leave this state for the purpose of prostitution shall be guilty of pandering." Section 563.040 provides "that any person who shall knowingly accept, receive, levy or appropriate any money or other valuable thing, without consideration, from the proceeds of the earnings of any woman engaged in prostitution, shall be deemed guilty of a felony. . . ."

Thus, these statutes deal only with those who perform certain criminal acts involving women; no penalties are provided for identical acts involving men. Thus, a woman who transports a boy for immoral purposes will not be prosecuted under these statutes.

It is submitted that the Federal Statute (18 U.S.C. 2421) violates the Fifth Amendment Due Process Clause of the U. S. Constitution and that the State Statutes underlying prosecution, Count II, violate the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution.

As the Fifth Amendment involves equal protection (e.g., *Greenwald* v. *Gardner*, 390 F.2d 591 (2nd Cir., 1968)), the two Amendments will be discussed together.

Recent cases in this area have focused primarily on classifications in legislation where women have been discriminated against. In *United States* v. *Gorls*, 281 F.Supp. 8 (D. Conn. 1968), the court dealt with a state statute which provided greater punishment for adult women than for men. The court stated that the equal protection rights of women should be tested by the standard announced by the Supreme Court in testing sexual classifications in criminal statutes, i.e., ". . . subjected to the 'most rigid scrutiny.' *Korematzu* v. *U. S.*, 323 U.S. 214 . . . to be upheld." The court held that the statute involved "an insidious discrimination against her which is repugnant to the equal protection laws mentioned by the Fourteenth Amendment." At p. 17.

In *Seidenberg* v. *McSorley's Old Ale House Inn*, 317 F.Supp. 593 (S.D. N.Y. 1970), the court there dealt with a suit against a drinking establishment which did not admit women into its confines. The plaintiffs, women, alleged that such practice was a violation of equal protection invoking irrational and arbitrary classifications.

The court noted that "discrimination based on sex will be tolerated under the Equal Protection clause only if it bears a rational relation to a permissible purpose of the classification. . . . Conversely, sex-based discriminations have been nullified when no persuasive difference between women and men could be offered to justify the difference in treatment." At p. 605. The court noted: "Outdated images . . . of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separation. At least to this extent woman's emancipation is recognized.'" At p. 606 (FN Omitted).

In *Moritz* v. *Commissioner*, 469 F.2d 466 (10th Cir., 1972), the court there dealt with a provision of the In-

ternal Revenue Code of 1967 that denied a tax deduction for expenses incurred in the care of certain dependents to a man who had never married.

26 U.S.C., Section 214(a) provides:

> "(a) General Rules—There shall be allowed as a deduction expenses paid during the taxable year by a taxpayer who is a woman or widow, or is a husband whose wife is incapacitated or institutionalized, for the care of one or more dependents . . . and only if such care is for the purpose of enabling a taxpayer to be gainfully employed."

The taxpayer had appealed from a decision of the Tax Court holding that he was not entitled to a deduction in 1968 for the care of his dependent invalid mother. The Government had successfully argued below that the deduction was unavailable because the taxpayer was a single man who had never married. The deduction under Section 214 was limited to, among others, a woman. The Tax Court sustained the Government's position, holding that the deduction was not available to the taxpayer as a man who had never married and rejected the contention that the denial of the deduction to him was arbitrary or unlawful.

The Tenth Circuit disagreed with the Tax Court's holding and the Government's position and found that the record showed that the expenses for the care of the taxpayer's invalid mother were for the purpose of enabling him to be gainfully employed. The court concluded that the denial of the deduction solely to a man who has never married and its allowance to women, widowers, divorcees and husbands under certain circumstances, was arbitrary, irrational and a denial of due process. The court thought the classification created was premised primarily on sex

and said, "Where treatment accorded is based on sex, the classification is subject to scrutiny under equal protection principles. . . . Those principles of equal protection basically apply here as part of the due process under the Fifth Amendment."

When placed under the "scrutiny required in viewing sex discrimination," the court found justification for the discrimination lacking. It concluded that the classification was an invidious discrimination and invalid under due process principles. The classification was, according to the court, "not one having a fair and substantial relation to the object of the legislation dealing with the amelioration of burdens upon the tax payer. . . . The statute did not make the challenged distinction as part of a scheme dealing with the varying burden of dependents' care borne of taxpayers, but instead made a special discrimination premised on sex, which cannot stand."

In *Frontiero* v. *Richardson*, 93 S.Ct. 1764, decided by this court last term, the court struck down certain Federal statutes which provided that a servicewoman might not claim her husband as a dependent without a showing that such husband was in fact dependent upon her, whereas a serviceman could claim his wife as a "dependent" without regard to whether the wife was in fact dependent. The court held:

> "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. (Footnote omitted) Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage. * * * As a result of notions such as these, our statute books gradually became laden with gross, stereo-typical distinctions between the sexes

and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. * * *" At p. 1769.

The court further stated:

"With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid."

The court concluded:

"The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U.S.C. Sections 401, 403, and 10 U.S.C. Sections 1072, 1076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command 'dissimilar treatment for men and women who are . . . similarly situated.' Reed v. Reed, *supra*, 404 U.S. at 77, 92 S.Ct. at 254." At p. 1771.

Attention of the court is also respectfully directed to the decision in *State* v. *Fields,* 13 Cr.L. 2376, wherein the Alaskan District Court struck down Alaska statutes banning women from prostitution and solicitation thereof but not prohibiting men from engaging in such acts. To like effect is *U. S.* v. *Moses,* (D.C. S.Ct., Nov. 3, 1972), 41 U.S. L.W. 2298, 12 Cr.L. 2198.

It is respectfully submitted that the classification of these statutes—that women need be specially protected—is in fact an arbitrary, and irrational classification as dealing only with criminal conduct relating to women. Why men are not protected by its confines, in these days of women's liberation, is difficult to rationalize. It is respectfully submitted that these statutes are void as unconstitutional and the court should have dismissed the indictment.

4. The delay of the Government in seeking an indictment of defendant was substantial: at least nineteen months elapsed between the testimony of the Key Government witness before a Grand Jury and indictment. The delay may well have been purposeful when all of the facts are examined. Defendant suffered actual prejudice. The Government adduced no evidence explaining the delay. On these facts, the lower court decision not to order dismissal of the indictment conflicts with the decision of this court in *U. S.* v. *Marion,* 404 U.S. 307 (1971), 10 Cr.L. 3028 and with the decisions of other courts of appeal. In any event, the trial court erred in not instructing the jury upon the issue of Government delay and this court should review that decision for the question involves an important question of federal law which has not been, but should be, settled by this court.

By motion, defendant moved to dismiss the indictment against him because of the unreasonable delay of the Gov-

ernment in seeking an indictment against him, resulting in his actual prejudice.

The applicable test in this respect is the case of *U. S.* v. *Marion,* 404 U.S. 307 (1971) decided December 20, 1971 by the Supreme Court of the United States, 10 Cr.L. 3028. What is involved in this case is pre-indictment delay. The Court stated: "Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to the indictment. Thus, the Government concedes that the due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was a purposeful device to gain a tactical advantage over the accused." 10 Cr.L. 3033. The Court indicated certain situations where actual prejudice (as opposed to possible prejudice) might result because of delay: "Memories will dim, witnesses become inaccessible, and evidence lost." 10 Cr.L. 1033.

The facts of this case amply demonstrate that memories had become dim, that witnesses were inaccessible and that evidence had become lost.

The investigation of defendant apparently goes back in point of time at least to November 22, 1968, when he gave a statement to FBI agents (Tr. p. 321). Additional statements were made by defendant on February 3, 1969 and on February 27, 1970, all to FBI agents (Tr. pp. 313-319). The Government's principal witness made the following statements to the FBI: February 3, 1969, February 22 and 23, 1970, February 24, 1970 and May 9, 1970 (See

Defendant's Exhibit 11, Tr. pp. 562-563). Additionally, Mrs. Williams testified at length before a Federal Grand Jury on February 25, 1970 (See Defendant's Exhibit 11, Tr. pp. 562-563). Also, Charles Hubbard made a statement before the Federal Grand Jury on May 19, 1971 and a statement to the FBI on February 22, 1971 (See Defendant's Exhibit 11, Tr. pp. 562-563). Raydene Murray made a statement to the FBI on March 18, 1971, and additionally on November 2, 1971, January 31, 1972, February 4, 1972 and February 7, 1972 (See Defendant's Exhibit 11, Tr. pp. 562-563). Herman Holloway gave a statement to the FBI on October 27, 1971 (See Defendant's Exhibit 11, Tr. pp. 562-563). Dr. Campbell McCullough made a statement to the FBI on March 17, 1972 (See Defendant's Exhibit 11, Tr. pp. 562-563).

FBI Agent Jeweler testified that he was the case agent in charge of this case from the latter part of '68 or early '69. He stated that the investigation of defendant had started before that date. Agent Jeweler stated he had no concrete evidence to present to a Grand Jury in the latter part of 1968 (Transcript of Proceedings June 26, 1972, pp. 14-22). Agent Jeweler testified further that he appeared before a Grand Jury "early 1970" (Tr. p. 23), and that from that date on no one appeared before a Grand Jury (Tr. p. 26). Agent Jeweler testified he appeared before a Federal Grand Jury himself in October 1971 and that no one else did (Tr. pp. 27, 29). The Government stated that in 1970 the Grand Jury was not asked to return an indictment (Tr. p. 29). The first indictment in this case was not returned until October, 1971 and the defendant not tried until June, 1972. From these facts it would certainly appear that the Government could have proceeded to indictment much earlier. As the testimony shows, the main witness was Mrs. Williams—as available

in 1970 as in June of 1972. Why the Government did not proceed is not clear, but suffice it to say that the testimony clearly shows that the delay actually prejudiced the defendant. Noted is the fact that defendant is black—and, in another respect, the Court did indicate that counsel for the Government was prejudiced against persons of the Black Race (Tr. p. 305). This prejudice may have been the reason for the Government delaying matters unduly so as to prejudice this defendant and is "purposeful" delay on the part of the Government.

The Government denied all discovery in the case prior to trial except for a bill of particulars and the records as to formal matters. 18 U.S.C. 3500 material was provided the morning of trial. This, coupled with the delay, actually prejudiced the defendant in the conduct of the trial.

Certainly, the testimony makes it clear that memories had dimmed, evidence lost, and witnesses inaccessible (one had died, Tr. p. 120).

As to the dimming of memories, defendant submits the following: Mrs. Williams testified that she met defendant around the first of January, 1968 with a girl named Ann (Tr. pp. 12, 14). No specific date was given. She testified that after she met Willis there was a trip to Leesville, then to New Orleans, and then to Kansas City. Again, no specific dates were given (Tr. pp. 26-27). She testified that when she got to Leesville, a man named Holliday knew Raydene Murray and Charles Hubbard (Tr. p. 30). She testified that after arrival in Kansas City she had prostitution dates in Kansas City but didn't remember how long it was after she first arrived in Kansas City that she began having prostitution dates, nor when she went over to the Casa Blanca Club the first time (Tr. pp. 39-40). She

further testified that "one evening" she and Raydene Murray went over to a place called Ollie Gates, about other dates, both that she had and that Raydene Murray and Pat Diamond had, that she and the other girls worked at these places "up until the riot" (Tr. pp. 43-49). Mrs. Williams testified that she and her "dates" would go to various hotels (Tr. pp. 50-51), and about a date with a Dr. McCullough at the Ramada Inn (Tr. pp. 51-53), and with a judge (Tr. pp. 53-54), that she and the other girls would go over to Kelly's Bar "every day except Sunday" (Tr. p. 44). As to the date with Dr. McCullough, she testified it was between "January and March" of 1968 (Tr. p. 56), and with the judge "around the same period of time" (Tr. p. 56). Mrs. Williams also testified about a trip to Houston and Leesville, again "latter part of February or the first of March '68" (Tr. p. 57), that she saw "Mr. Holloway" in Leesville, that she, Raydene Murray and Pat Diamond went to Leesville on this date (Tr. p. 58), and that Mr. Willis was with them on this occasion (Tr. p. 59), and that there was a "raid" in Leesville and a red overnight kit was left (Tr. pp. 60-61). She further testified that "We stayed that particular evening and the next day." (Tr. p. 60), and that a girl named "Lois" accompanied the group when they left, that Mr. Holloway ordered them to take Lois with them (Tr. pp. 62-63), and that further prostitution took place in Houston but that she didn't remember how long they stayed in Houston (Tr. p. 64), came back to Kansas City and "started working out of Kelly's again and the rest of the places." (Tr. p. 64), that she had an accident in "April of 1968" and didn't work regularly as a prostitute after that (Tr. pp. 66-68), that Raydene Murray on the first trip to Leesville paid for gasoline in the car with a credit card and signed the name Ernestine Parker (Tr. pp. 68-69). On the second trip to Leesville, she didn't know who paid for the gasoline (Tr. p.

69). On cross-examination, Mrs. Williams stated she didn't know how many times she had engaged in prostitution from January to March 1968, that she didn't remember what dates she met men in the Hotel Kansas Citian (Tr. p. 120), and stated that the girl named "Ann" who was with her the first time defendant met her was dead (Tr. p. 120), further testified she didn't know the dates she went to the Downtowner Motel or the Ramada Inn for purposes of prostitution, didn't remember the names the customer or she registered in, or the exact amounts of money paid for prostitution, didn't remember the dates on which she engaged in prostitution at an apartment at 35th and Paseo (Tr. pp. 120-123). She further admitted to making a statement in 1970 that Charles Hubbard made the arrangements with Holloway in Leesville and that this "would be a pretty good recollection" (Tr. p. 130). She further testified that she had told the Grand Jury in 1970 it was about two weeks after she got to Kansas City that she had her first prostitution date but that she had forgotten about the "date that I had at the club the first time I went there" (Tr. p. 132). Mrs. Williams testified that she didn't remember what oil company credit card was used on the first trip from Houston to Kansas City (Tr. pp. 133-134). She also testified that there was a '65 Thunderbird in the possession of the group going to Houston in March, 1968, and the FBI made a mistake in their report of an interview with her on February 3, 1969 by noting she told them she owned a 1965 Thunderbird, but that she owned a 1968 Thunderbird. She also admitted that her earnings as a prostitute for defendant amounted to approximately $1,000 (Tr. p. 109).

Charles Hubbard testified about two (2) trips to Leesville in late December or early January 1968. He testified that he, Willis and Raydene Murray had gone to

Leesville but that no prostitution took place the first time. On the second trip, he, Raydene Murray and Rose Marie Williams went to Leesville. Hubbard testified that he left Leesville about "8 or 9 o'clock at night." He testified further that he stayed in Kansas City in "February" and that about fifteen days later he remembers defendant, Rose Marie Williams, Raydene Murray, and Pat Diamond coming to Houston. He testified earlier that he drove a "'68 or '69 Thunderbird" in Kansas City (Tr. p. 174) and that he saw this Thunderbird in Houston when the group returned (Tr. p. 177). He testified he didn't know whose name the credit card was in that was used to purchase gasoline during the trip from Houston to Kansas City (Tr. p. 178). Contradicting Rose Marie Williams, he stated that, on the trip to Leesville in January 1968 involving Rose Marie Williams and Raydene Murray, the group stayed about "two to three days", and did not arrive there about nine o'clock in the evening and leave the next morning. He did state he stayed in the trailer house with the girls (Tr. p. 181). He, however, admitted making a statement to the FBI on February 23, 1971 in which he stated that he was instructed by two women to drive them to Leesville, that upon arrival there he checked into a motel to sleep and the two women took the car and left and he didn't see them again for about a day and a half but that the FBI had taken his statement down wrong (Tr. p. 185). Hubbard stated that defendant gave him $100.00 in Houston but acknowledged that he had told the FBI it was $150.00 plus $50.00 additional in expense money but that the FBI had made a mistake (Tr. p. 202). Hubbard further testified that he had originally told the FBI that the first trip he was to make for defendant was one to New Orleans (Tr. p. 211), and didn't tell the FBI about a trip to Leesville (Tr. p. 212).

Dr. Campbell McCullough testified that he gave Raydene Murray—not Rose Marie Williams—a check for $100.00 on March 13, 1968, but not for the purpose of prostitution (Tr. pp. 276-277). He also testified concerning a check for $100.00 to Jim Willis dated January 14, 1970 but did not remember the circumstances surrounding the giving of the check.

Raydene Murray testified that she and Rose Marie Williams went to Leesville, Louisiana in early January 1968 but that it was Williams's idea to engage in prostitution (Tr. p. 336). She denied at first taking Rose Marie Williams to the Lorelei Bar but "could have" (Tr. p. 347), stated defendant hadn't gone with her and Rose Marie Williams to Kelly's Bar in 1968 (Tr. p. 348), denied working as a prostitute in Leesville (Tr. p. 349), said that when she traveled to Kelly's Bar she used her automobile and "could have" used defendant's automobile (Tr. p. 349), didn't know if Pat Diamond had ever accompanied her to Kelly's Bar (Tr. p. 350), "couldn't account for the period January, February and March 1969 (Tr. p. 351), denied ever having dated Dr. Campbell McCullough (Tr. p. 352), denied ever having any prostitution dates at the Town House Motel (Tr. p. 354), denied having a prostitution date with a judge in 1968 (Tr. p. 358), denied prostituting herself in Leesville, Louisiana in March 1968 (Tr. p. 361), denied having a prostitution date with anyone during 1968 (Tr. pp. 364-365).

Defendant also indicated difficulty with remembering dates. When asked when it was exactly "he went to Houston the second time in 1968" he replied that he couldn't remember the exact date (Tr. p. 404), that he couldn't remember the exact date his tailor finished his clothes (Tr. p. 405), that he couldn't recall the trip back to Kansas City from Houston in March 1968 (Tr. pp. 406-

408), that he could not recall going to Oklahoma City in January '65 even when shown a credit card purchase slip (Tr. p. 408), couldn't recall the first time he asked Rose Marie Williams to marry him (Tr. p. 452), couldn't recall when Dr. McCullough started renting from him (Tr. p. 458), couldn't recall the exact date of a trip to St. Louis (Tr. p. 454), or recall much else about it.

As to evidence being lost, Tom Little, another defense witness, testified that records which would have shown the employment of Rose Marie Williams and Raydene Murray at the Casa Blanca Club in 1968 were burned in a fire at the Casa Blanca Club on July 30, 1970—more than four months after Rose Marie Williams testified before a Grand Jury (Tr. p. 471). Had the Indictment been brought at the time Mrs. Williams testified before a Federal Grand Jury, and the investigation proceeded forthwith, these records could have been preserved and the defendant perhaps acquitted.

In any event, the Government offered no evidence to explain the reason for the delay. When excessive delay has been shown, other courts of appeal have held that a presumption of prejudice is created and the burden shifts to the Government to demonstrate otherwise. *U. S.* v. *Cassell*, 452 F.2d 533, 538-39 (7th Cir., 1971); *Murray* v. *Wainwright*, 450 F.2d 465, 471 (5th Cir., 1971). The Government elected not to assume the burden and thus conceded the issue. In *Strunk* v. *U. S.*, 41 L.W. 4794 (1973) this court dismissed an indictment for undue delay in prosecution when the Government conceded the issue.

Thus, because of the unreasonable delay on the part of the Government, because of the denial of discovery, because a witness had died, because the witnesses' memories were dim, the defendant was actually prejudiced and de-

nied a fair trial and the Court should have dismissed the Indictment.

Finally, the Court refused defendant's requested instruction to the effect that the jury must acquit the defendant should they find that the delay in bringing the Indictment actually prejudiced the defendant (Tr. p. 490). The Supreme Court in the *Marion* case, *supra*, did not address this question. However, in an analogous situation, the Supreme Court has held that, in connection with the procedure for determining the voluntariness of confessions, a hearing outside the jury must first take place to determine voluntariness. If the Court determines the statement to be voluntary, then the statement may go to the jury, but the defendant may obtain an instruction if he adduces evidence showing the confession to be involuntary. *Jackson* v. *Denno*, 378 U.S. 368 (1964). This is the procedure the Court should have followed with respect to the actual prejudice resulting from the delay of the Government, especially when the defendant made a substantial showing of actual prejudice.

5. It was error for the trial court to admit the arrest record of Hattie Diamond because there was no proper factual foundation laid, and said arrest record was not relevant to any of the issues in the case. Defendant's right to a fair trial was violated by its admission.

The Government was permitted, over objection, to get into evidence the arrest record of a Hattie May Diamond for prostitution. It was shown that defendant Willis did sign a bond slip for this particular person (Tr. pp. 267-270). No person named Hattie Diamond or anyone else was ever called to the witness stand to be identified as being the same person mentioned in the evidence. There was a stipulation by counsel only that the record was in fact a

business record of the Kansas City, Kansas Police Department. Other objections were reserved.

Of course, this evidence should not have been admitted because there had not been a proper factual foundation laid—no one knows whether the Hattie May Diamond of the arrest report was the same person mentioned in the evidence or not. Further, no conviction was shown and quite clearly a mere arrest for prostitution does not constitute proof of prostitution.

In *U. S.* v. *Crawford*, the court reversed a conviction where the prosecutor was permitted to ask questions of a defendant as to the alleged convictions of his alleged acquaintances. *A fortiori*, direct evidence of an arrest of someone not even identified as an acquaintance is improper and highly prejudicial to this defendant. Clearly, this was but another attempt by the Government to prejudice defendant and deny him a fair trial.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1704

United States of America,
Appellee,

v.

James Arthur Willis,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: May 14, 1973.
Filed: June 29, 1973.

Before GIBSON, HEANEY and ROSS, Circuit Judges.

Ross, Circuit Judge.

This is an appeal from the judgment of conviction, after a jury verdict, finding James Arthur Willis guilty of violating the provisions of 18 U.S.C. §§2421 and 1952. We affirm.

Willis was tried on a two count indictment: 1) transporting two women, Rose Marie Williams and Raydene Murray, in interstate commerce for the purpose of prostitution in violation of 18 U.S.C. §2421, and 2) having trav-

eled and caused travel in interstate commerce to facilitate prostitution enterprises illegal under state law in violation of 18 U.S.C. §1952. The Government's bill of particulars alleged with respect to count 2 that appellant transported Rose Marie Williams, Raydene Murray, Hattie Mae Diamond, and Sandy Terrazas interstate to facilitate unlawful prostitution enterprises. In general, the Government sought to prove transportation between Missouri, Kansas, Texas, and Louisiana. Willis was a nightclub operator in Kansas City, Kansas.

Willis rests his appeal on six asserted grounds of error:

1. Pre-indictment delay caused substantial prejudice to Willis' right to a fair trial.
2. Certain cross-examination of Willis was prejudicial and improper.
3. The testimony of one witness (McCullough) was not relevant or material.
4. The witness Murray was improperly allowed to invoke her fifth amendment right not to answer incriminating questions in front of the jury.
5. It was error to admit into evidence the arrest record of Hattie Mae Diamond and a bail bond slip signed by Willis.
6. The statutes upon which the prosecution was based invidiously discriminate against males.

We have examined the first, third and sixth allegations of error, and after a full reading of the record and study of the applicable law conclude they are without merit. Discussion of these allegations would serve no useful purpose and would unduly extend the length of

this opinion. Consequently we will limit discussion to the second, fourth, and fifth assertions of error.

Cross-examination of Willis

During the direct examination of Willis it was learned that he had employed Rose Marie Williams and Raydene Murray at the Casa Blanca Club in 1968. On cross-examination Willis stated that he had paid Williams $15 per day plus tips, but could not remember how much he had paid Murray. Government counsel asked Willis if he had paid either woman $8,000 in 1968. Willis could not recall as to Murray, and indicated doubt as to Williams. Willis also could not recall whether he had told his accountant to prepare *1968* individual income tax returns for the two women reporting income of $8,000 each. At this point defense counsel objected, indicating that the returns were not prepared by Willis, not filed, and not signed. The court overruled the objection.

Government counsel then handed to Willis two individual tax forms for *1969* made out for Williams and Murray. Willis examined the forms and indicated that he probably directed the accountant to prepare the return for Murray, but he could not be sure as to Williams. Willis further indicated that if the records indicated that he paid the women $8,000 that was what they were paid. The returns were never placed in evidence.

Willis' main objection to this cross-examination is that it purportedly related to evidence of an unrelated crime. Of course, such cross-examination would have been improper. The simple answer to Willis' contention is that there was nothing in the colloquy between Willis and the Government's counsel which might conceivably raise an inference of tax evasion. In fact the whole thrust of the Government's cross-examination was that the tax returns

properly represented the sums paid to the women. Therefore, *South* v. *United States*, 368 F.2d 202 (5th Cir. 1966), is not "squarely on point with the facts" as Willis argues. In *South* the Government used the *defendant's* low reported income to buttress its claim that he must have engaged in gambling since he was able to support his family despite a meager income. The Court reversed the conviction, (for using the mails in furtherance of illegal gambling), partly because it was convinced that such evidence tended to demonstrate the defendant's guilt of the unrelated crime of failing to report his true income. No such inference could possibly be drawn in this case.

Willis also argues that the cross-examination was improper because:

1. the cross-examination was based upon tax returns which were never introduced into evidence. *See McKenna* v. *United States*, 232 F.2d 431, 437 (8th Cir. 1956); *United States* v. *Sawyer*, 469 F.2d 450, 452 (2d Cir. 1972); *Robbins* v. *Small*, 371 F.2d 793, 795 (1st Cir.), *cert. denied*, 386 U.S. 1033 (1967).

2. the cross-examination, and presumably the tax returns were, "irrelevant, incompetent, immaterial and collateral to the issues";

3. the cross-examination exceeded the scope of direct examination as the tax returns related to 1969, but the direct examination related only to 1968. *See United States* v. *Hiken*, 458 F.2d 24, 26 (8th Cir.), *cert. denied*, 409 U.S. 842 (1972).

We have serious doubts as to the propriety of this cross-examination which was based upon tax returns never admitted into evidence, particularly when the returns were never signed, never filed, and were unrelated to the taxa-

ble year under examination. However, this Court has long held that:

> "The fact that the cross-examination of a defendant exceeded the bounds of propriety does not call for reversal unless it was prejudicial and amounted to a denial of some substantial right of the defendant." *Davis* v. *United States,* 229 F.2d 181, 186 (8th Cir.), *cert. denied,* 351 U.S. 904 (1956).

Assuming the cross-examination was improper, we believe beyond a reasonable doubt[1] that it was harmless error for the trial judge to allow it. *See generally Milton* v. *Wainwright,* 407 U.S. 371 (1972); *Schneble* v. *Florida,* 405 U.S. 427 (1972); *Harrington* v. *California,* 395 U.S. 250 (1969); *Chapman* v. *California,* 386 U.S. 18 (1967); *Kotteakos* v. *United States,* 328 U.S. 750 (1946); F.R.Crim.P. 52(a); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§851-855 at 350-372 (1969).

First, with regard to Murray, the tax returns and the examination of Willis demonstrated no more than that she was paid $8,000 for full-time legal employment. The inference to be drawn from the examination is neutral, and perhaps beneficial to the defense. We fail to understand what the Government was trying to prove by this examination, but cannot conceive that it harmed Willis in any way.

Second, as to Williams, the Government apparently sought to suggest that she was paid an exorbitant amount of money for part-time work, thus tending to prove that

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1. Although Willis does not phrase his argument in such terms, we have approached this question as if he alleged error touching some constitutional deprivation as opposed to error lacking constitutional dimensions. *Compare Kotteakos* v. *United States, supra,* 328 U.S. 750 *with Chapman* v. *California, supra,* 386 U.S. 18.

she was paid by Willis for illicit activity. Williams had already testified at great length that she worked as a prostitute for Willis. Charles Hubbard, an employee of Willis during part of the time in question, testified that he saw Willis give Williams, Murray and a woman by the name of Pat, money. He further testified that the women gave Willis money. Moreover, he testified that he had personal knowledge that prostitution was going on where Willis resided. In light of this strong eye witness testimony, it is a remote possibility, at the very best, that the cross-examination relating to the tax returns influenced the jury insofar as whether they believed Williams worked as a prostitute for Willis.

Furthermore, defense counsel could have obviated any impact, no matter how slight, this cross-examination might have had on the jury. The Government's argument was apparently that Mrs. Williams was paid an exorbitant amount of money in 1968 for part-time work, thus tending to prove payment by Willis for prostitution. The factual predicate for this suggestion was that the tax returns purportedly related to 1968. In fact, the tax returns related to 1969. Therefore, there was no valid basis upon which to analyze Williams' income in 1968. Defense counsel saw the returns prior to their use during a bench conference. After the cross-examination was over, defense counsel approached the bench and informed the court that the tax returns were for 1969. The prosecutor indicated that he was genuinely surprised. The trial court asked whether defense counsel wanted the jury informed of this fact. Counsel said, "I just wanted to make a record on it because we asked for a mistrial." Tr. 479. Had the jury been informed of this fact, at that time, whatever inference the Government sought to suggest would have been destroyed. While we do not fault counsel for making a

"record", we are somewhat hesitant to hear Willis' complaint, since a strong argument could be made that a "defendant will not be heard to complain when he fails to avail himself of a proper remedy because he wanted more than offered." *United States* v. *Akin*, 464 F.2d 7, 8 (8th Cir.), *cert. denied*, 409 U.S. 981 (1972). We have fully considered Willis' argument, and as previously stated, in spite of the possibly erroneous use of the return by an overzealous prosecutor, we find the purported error to have been harmless beyond a reasonable doubt.

Murray's invocation of self-incrimination privilege in front of the jury.

Raydene Murray was called by the Government in its case in chief as a witness. Her answers to the Government's questions were apparently not what Government counsel expected to hear. Government counsel finally asked:

> "Why did you take Rose Marie Williams to Leesville, Louisiana? All I want is the truth." Tr. 290.

Defense counsel asked the question be stricken and the trial court so ordered. At that point defense counsel asked to approach the bench. A conference was held, and defense counsel asked the witness be informed of her privilege not to incriminate herself. The trial court, in the presence of the jury and without objection from defense counsel, then informed the witness of her privilege and asked if she wanted to consult with counsel. She requested the services of a lawyer. An attorney from the Federal Public Defender office was appointed to consult with Murray and he did. After that consultation the Government prepared to recall her, informing the trial court and the defense that the Government was prepared to offer Murray immunity. Counsel for the defense objected to such a pro-

cedure if it was to be held in front of the jury. The trial court indicated, "I think we are going to have it in front of the jury so they will understand what is going on." Tr. 332. The court concluded that he could conceive of no prejudice to the defendant. Under the circumstances of this case we agree with the trial court's conclusion.

Willis' objection to this procedure is that the jury must have thought the witness' invocation of the privilege was an admission of guilt tending to implicate Willis. It must be emphasized that there is no evidence and no contention that the Government expected the witness to invoke the privilege. In fact Government counsel indicated that Murray had been advised of her rights, and on every prior occasion had indicated that she would testify voluntarily. Perhaps most importantly Murray's testimony dispelled any idea that her invocation of the privilege was an implicit indictment of Willis. After she had invoked the privilege and had been granted immunity she testified:

"Q. [M]r. Willis didn't ask you to transport Marie—Rose Marie Williams to Leesville?

A. It was her idea. Tr. 336

. . .

Q. All right. Did you work as a prostitute . . .

A. No.

Q. In Kelly's bar?

A. No.

Q. Did you work as a prostitute in Leesville, Louisiana . . .

A. No.

Q. In January of 1968?

A. No. Tr. 349

. . .

Q. Have you ever seen Rose Marie Williams give money to Jimmy Willis?

A. No.

Q. Have you ever given money to Jimmy Willis under any circumstances?

A. No. Tr. 361.

. . ."

In closing argument defense counsel was quick to use the Government's embarrassing position:

> "And remember the other girl who was talked about by Rose Marie Williams, what was her name? Raydene Murray. She testified in here and was granted immunity, the government said, 'Nothing can happen to you. You just sit up here and tell the truth.' She was sworn and she denied that Jimmy Willis had anything to do with the prostitution activity and she had nothing to fear because the government said, 'We are not going to go after you for these prostitution activities.' " Tr. 507.

Furthermore, had Murray's testimony been damaging she was subject to being fully cross-examined. Finally, we note, without attaching a great deal of significance to the point, that it was defense counsel who precipitated informing Murray of her rights.

Willis primarily relies on *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972). This case is far removed from the facts of *King*. In *King* the Government deliberately called two witnesses knowing they would invoke the privilege and no immunity was granted. This difference renders *King* totally inapplicable to the facts of this case. *See generally Namet* v. *United States*, 373 U.S. 179 (1963); *Gerberding* v. *United States*, 471 F.2d 55, 59-60 (8th Cir.

1973); *United States* v. *McKuin*, 434 F.2d 391, 397-398 (8th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

Admission of arrest record and bail bond receipt.

The Government, over a relevancy objection,[2] was allowed to introduce into evidence the arrest record of Hattie Mae Diamond for investigation of soliciting prostitution and vagrancy, and a bail bond slip signed by Willis. The parties had stipulated that the records were business records of the Kansas City, Kansas, police department.

Willis objects to this evidence because of a lack of a proper foundation, although he did not specify this as a ground for objection at the time the evidence was offered. Foundation objections require specificity. Reversal is not required with regard to alleged improper admission of exhibits without sufficient foundation, in the absence of a specific objection on foundation grounds. *United States* v. *Dixon*, 446 F.2d 224 (9th Cir. 1971). *See also Price* v. *United States*, 464 F.2d 1217, 1218-1219 (8th Cir.), *cert. denied*, 409 U.S. 1040 (1972); 1 J. WIGMORE, WIGMORE ON EVIDENCE § 18 at 339-340 (3 ed. 1940).[3]

The question of relevancy is properly presented, and we believe the evidence was relevant. It was obviously relevant for the Government to demonstrate a symbiotic or dependent relationship between Willis and the women involved. This evidence tends to prove just such a relation-

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2. "The other objection that we have is to the probative value of . . . an arrest record of Hattie May Diamond and a bond receipt allegedly signed by James Willis." Tr. 261.

3. Willis argues that the Government failed to establish that the Hattie Mae Diamond referred to in an arrest record was the same woman referred to in the Government's bill of particulars, but Willis later testified that she was.

ship. The arrest record by itself would not have been relevant. *United States* v. *Davis, supra,* 229 F.2d at 185. But the bail bond receipt and the arrest record establish Hattie Mae Diamond's dependence upon Willis. In this sense, the documents taken together, are relevant.

Willis asserts that this evidence had the tendency of unfairly associating him with an unrelated crime. The simple answer to Willis' argument is that Willis' activity in signing the bail bond receipt was clearly not criminal. In any event the evidence, as we have said, was relevant. It was the trial judge's duty to weigh the relevance of the evidence against the possibility of prejudice:

> "This balancing of intangibles—probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized." C. McCORMICK, EVIDENCE § 152 at 320 (1954). *See also* 1 J. WIGMORE, WIGMORE ON EVIDENCE § 28 at 409-410 (3 ed. 1940).

And as this Court has often said:

> "Generally speaking the admissibility of evidence is a question within the discretion of the trial court, and a court of appeals will confine its inquiry to whether there was an abuse of that discretion." *United States* v. *Skillman,* 442 F.2d 542, 551 (8th Cir.), *cert. denied,* 404 U.S. 833 (1971).

We find no abuse of discretion as to this evidence.

For the reasons hereinbefore expressed the judgment of conviction is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES ARTHUR WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of having transported women in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. 2421 (the Mann Act), and of having traveled and caused travel in interstate commerce to facilitate prostitution enterprises illegal under state law, in violation of 18 U.S.C. 1952. He was sentenced to concurrent sentences of five years' imprisonment on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

1. Petitioner's claims that the cross-examination of him by the government concerning certain income tax forms was improper, that the trial court erred in permitting a witness to invoke her Fifth Amendment rights in the presence of the jury, and that the arrest record of one

of his associates should not have been received into evidence are fully answered in the opinion of the court of appeals, upon which we rely (Pet. App. A3-A11).

2. Petitioner's claim that he was denied his right to a speedy trial is without merit. He was originally arrested and indicted on October 7, 1971,[1] for offenses covering the period January 1, 1968, to February 22, 1970. The evidence presented at trial primarily concerned unlawful conduct by petitioner between January and April 1968. In *United States* v. *Marion*, 404 U.S. 307, this Court held that the speedy trial provision of the Sixth Amendment has no application until the putative defendant becomes an "accused" by being arrested or charged with a crime. 404 U.S. at 313.[2] In light of that decision, petitioner, who complains only of delay occurring before his indictment and arrest, cannot assert a Sixth Amendment claim.

Marion recognized that in certain circumstances, even though the statute of limitations has not expired, pre-indictment delay might so impair a defendant's capacity to prepare a defense as to violate his Fifth Amendment right to due process and require dismissal of the prosecution. 404 U.S. at 324-325. However, petitioner has not made the kind of specific showing of prejudice that is needed to substantiate a due process claim. He principally complains that the passage of time dimmed the memories of the government's witnesses, especially with regard to the specific dates on which events occurred. But the

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[1] A superseding indictment was returned on April 8, 1972, which corrected a typographical error in the original indictment.

[2] As this Court noted in *Marion*, Rule 48(b), Fed. R. Crim. P., which authorizes dismissal of an indictment "[i]f there is unnecessary delay in presenting the charge to a grand jury * * * against a defendant who has been held to answer to the district court * * *," is limited to post-arrest delays. 404 U.S. at 319.

inability of government witnesses to recall some dates exactly and a similar alleged failing in petitioner's memory in no way undermined the basic case against petitioner, which was grounded on his conduct of an illegal prostitution business.[3]

3. Petitioner contends that both the Mann Act and the Missouri prostitution statutes (Mo. Rev. Stats. §§563.010, 563.040) underlying his conviction under 18 U.S.C. 1952 unconstitutionally discriminate between the sexes, because they deal only with female and not male prostitution. The limitation of these statutes to female prostitution reflects, however, not invidious discrimination, but rather the determinations of Congress and the Missouri Legislature that male prostitution does not pose a sufficient social problem to require comparable legislative action. The statutes do not distinguish between male and female offenders. A woman who commits the same acts as petitioner did would also violate the law. The constitutionality of 18 U.S.C. 2421 was recently sustained in *United States* v. *Marks*, 475 F. 2d 1405 (C.A. 7),

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[3] Petitioner also argues that the trial court erred in refusing to instruct the jury to acquit him if they found that the government failed to bring the prosecution within a reasonable time. Whether such prejudice exists as to prevent a fair trial is a matter for determination by the court.

certiorari denied, No. 72-6713 (October 9, 1973), in the face of similar challenge.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[4] A different result is not required by this Court's decision in *Frontiero* v. *Richardson*, 411 U.S. 677, or the other lower court cases cited by petitioner (Pet. 21) concerning the constitutionality of statutes making prostitution or the solicitation therefor by a woman, but not by a man, a crime. In such cases, unlike this case, the challenged statutes, either on their face or as applied, made criminal certain conduct by members of one sex, although the same conduct by members of the opposite sex was not criminal. Petitioner is not affected by, and thus can base no claim upon, the fact that 18 U.S.C. 2421 does not apply to transportation of men for the purpose of prostitution.

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